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No. 11,872

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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CONSTANCIO R. ALESNA, JOSE BAGOGO BERNAL, DANIEL RODRIGUES FERREIRA, YUTAKA GOHARA, CORNEL IHA, MASASHI KAGEYAMA, TOROICHI KANDA, FRANK GONSALVES PERREIRA, NOBORU TAKEUCHI, FRED TANIGUCHI and GENKICHI WADA,
Appellants,

vs.

PHILIP L. RICE, as Judge of the Circuit Court for the Fifth Judicial Circuit of the Territory of Hawaii, and WALTER D. ACKERMAN, JR., as Attorney General of the Territory of Hawaii,
Appellees.

Upon Appeal from the United States District Court for the District of Hawaii.

APPELLANTS' OPENING BRIEF.

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Table of Contents

Table of Authorities Cited

Texts and Periodicals

Statutes

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STATEMENT OF JURISDICTION.

This is an appeal from a judgment and decree of the United States District Court for the District of

Hawaii, summarily dismissing, before hearing on the merits, appellants' complaint for injunction and dissolving an injunction *pendente lite* theretofore issued by the Court against the appellee Attorney General, his deputies and representatives. (R. 344.)

Appellants' complaint (R. 5) was brought in the District Court under Section 41, subdivision (14) of Title 28 of the United States Code, conferring jurisdiction on that court of suits, at law or in equity, authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any state of any right, privilege or immunity secured by any law of the United States providing for equal rights of citizens.[1]

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[1]The District Court in its ruling on appellants' motion for a preliminary injunction held it had jurisdiction under Section 41 (14) of Title 28 of the U. S. Code. (R. 54.) Eight months after this ruling, a specially constituted three judge court under Section 266 of the Judicial Code (28 U.S.C. Section 380) in the case of *Mo Hock Ke Lok Po, et al. v. Ingram M. Stainback, et al.*, 74 Fed. Supp. 852, reached a contrary conclusion, holding that Section 41 (14) of Title 28 did not confer jurisdiction on the Federal District Court for the Territory of Hawaii of a case involving deprivation of federal rights under color of Territorial law, and therefore, jurisdiction in such cases in the Territory must rest on Section 41 (1).

In the light of the *Po* case, the District Court in the instant case requested the parties to consider the correctness of its prior holding that Civil Rights Act remedies were available in the Territory under Section 41 (14). Counsel for both parties briefed and argued the question exhaustively, and both agreed that the Civil Rights Act applies in the Territory and that the word "state" in Section 41 (14) should not be narrowly interpreted to exclude the Territory of Hawaii. The parties agreed, and the District Court held (R. 314, 317-318), that to do so would be to mutilate and defeat the express intention of Congress in Section 43 of Title 8 of the U. S. Code which provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State *or Territory*, subjects, or causes to be subjected, any citizen of the United

Appellants sought in their complaint an injunction restraining the appellees from all further proceedings in the Circuit Court of the Fifth Judicial Circuit of the Territory of Hawaii under an indictment in two counts against the appellants charging them in one count with picketing in groups larger than three, and in the second count with mass picket-

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States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. (Italics ours.)

By this section, Congress clearly created a substantive Federal right for persons deprived of rights under color of Territorial law. Federal courts have never permitted substantive federal rights to be defeated for lack of a remedy. *Kiefer & Kiefer v. Reconstruction Finance Corporation,* 306 U.S. 381, 389 (1939); *Texas & N.O.R. Railway Company v. Railway Clerks,* 281 U.S. 548, 568 (1930); *United States v. Hutcheson,* 312 U.S. 219 (1941); and see particularly the case of *Bell v. Hood,* 327 U.S. 768, where the Court said:

> * * * and it is well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

The Court in the *Po* case suggested that Congress intended to leave redress of rights under the Civil Rights Act to Territorial Courts where the amount involved was less than $3,000. Such a construction would, however, in some instances, as here, result in absurdity since the application for redress might have to be made to the territorial judge who plaintiff contended had deprived him of his federal and constitutional rights. See *Screws v. United States,* 315 U.S. 91, 98 (1945); *Picking v. Pennsylvania* (C.C.A. 3), 151 F. (2d) 240 (1945).

In support of the correctness of District Court's holding that the word "state" as used in Section 41 (14) includes the Territory of Hawaii, as against contrary holding in the *Po* case, see *Andres v. Territory of Hawaii,* 92 L. ed. Adv. Sheets 790 (decided April 26, 1948). There the Court said:

> The petitioner contends that the phrase "laws of the State" limits the statute to the forty-eight states and consequently provides for no method of inflicting the death penalty where sentence is imposed by a district court sitting in a Territory. We reject that contention as being without merit. In many contexts "state" may mean only the several states of the United States. Here, however, we hold that its meaning includes the Territory of Hawaii.

ing, which alleged conduct was charged to be in violation of an amended ex parte temporary restraining order issued by the appellee judge of the Territorial Circuit Court.

Appellants alleged that the appellees had injured, oppressed and intimidated them in the free exercise and enjoyment of rights guaranteed by the First Amendment, Sections 1 and 20 of the Clayton Act (29 U.S.C. 52 and 53), and the Norris-LaGuardia Act (29 U.S.C. 101-115), and threatened, unless restrained, to continue in their unlawful conduct.

Jurisdiction of this Court is conferred by Section 128 of the Judicial Code (28 U.S.C. Section 225) conferring jurisdiction on this Court of Appeals from final decisions of the United States District Court for the District of Hawaii in all cases.

STATUTES INVOLVED.

Sections 1 and 20 of the Clayton Act (29 U.S.C. 52 and 53) and the Norris-LaGuardia Act (29 U.S.C. 101-115) are printed in full in the appendix, *infra.*

STATEMENT OF CASE.

The appellants brought this action under Section 41 (14) of Title 28 of the United States Code giving Federal District Courts jurisdiction of suit brought under the Civil Rights Act. The right of action of the individual plaintiffs is conferred under Section 43 of

Title 8 of the United States Code which gives a cause of action to every person deprived under color of territorial law, of rights guaranteed by the laws of the United States and the Constitution.

The appellants alleged four different grounds upon which the appellees, acting under color of territorial law, had deprived, injured, oppressed and intimidated them in the free exercise of rights guaranteed by the laws and Constitution of the United States. They alleged, that unless restrained, appellees would continue in their unlawful conduct. Appellants further alleged that they had no plain, adequate and speedy remedy at law and asked the Court to enjoin the continued deprivation of their rights by appellees. (R. 5.)

Factually, the background of the case is as follows:

In September, 1946, there was a strike in progress against the Lihue Plantation Company, Limited, a sugar plantation on the Island of Kauai in the Territory of Hawaii, called by the recognized exclusive bargaining representative of its employees, Unit 1, Local 149 of the International Longshoremen's and Warehousemen's Union, CIO. After the strike had been in progress seventeen days, on September 17, the Lihue Plantation Company applied to the appellee judge for an ex parte restraining order. The appellee judge issued a restraining order in the form requested by the company. The order restrained the International Longshoremen's and Warehousemen's Union, CIO, a trade union consisting of thousands of members employed in the Territory of Hawaii, in the continental United States, Puerto Rico and Canada;

Local 149 of said Union, which includes the employees of almost all the sugar plantations on the Island of Kauai; Unit 1 of Local 149, which includes the employees of Lihue Plantation Company; the individual officers of Unit 1 of Local 149; and unnumbered John and Mary Does and Roes.

Thereafter, the defendants in the equity action moved to dissolve the ex parte restraining order on the grounds that the Court was without jurisdiction to issue it without complying with the provisions of the Norris-LaGuardia Act and that the order issued violated the constitutional rights of the persons restrained. The appellee judge denied the motion, but subsequently on his own motion amended the restraining order by deleting therefrom restraints not requested by the petition of the Lihue Plantation Company.

Insofar as here relevant, the ex parte restraining order, as amended, prohibited the defendants in the equity action

> . . . until further order of this Court from *in any way* . . .
>
> (7) Mass picketing by assembling in compact groups or congregating in crowds on or near real property of the petitioner, whether used for business or residence purposes, to thereby prevent or attempt to prevent or in any manner physically obstruct or interfere with ingress to or egress from said real property by petitioner, any of its employees, or any other persons lawfully seeking to enter or leave any of said real property;

> And in Furtherance Hereof, you are hereby ordered to limit the number of pickets which you shall use to not more than three (3) pickets in a group at any point and station when stationed at points of ingress to and egress from the petitioner's property, provided, however, that any pickets in excess of three (3) at any one point and station, shall be in motion, and, except when passing each other, shall maintain a distance of not less than ten (10) feet between each other . . . and all pickets being also enjoined from *otherwise committing* any of the acts hereinabove prohibited. (R. 41, 45-46.)

The appellants were indicted for unlawfully, feloniously and willfully violating these specific provisions of the ex parte amended order. (R. 32-40.) None of the appellants were defendants in the equity suit and most of them are not employed by the Lihue Plantation Company nor members of the unit representating its employees. No fraud or violence is charged in the indictment—merely that appellants mass picketed and congregated in crowds in groups of more than three, not being in motion.

Geographically, the scope of the ex parte amended order encompasses "on or near the real property of the petitioner, whether used for business or residence purposes." This includes 12,472 acres, 20 company towns or camps in which the employees and their families live, miles of privately owned, but publicly used roads and some public highways and streets.

At the time appellants' complaint was filed there was pending before this Court an appeal from a de-

nial by the Supreme Court of the Territory of a writ of prohibition against another Circuit Court judge who had likewise issued an ex parte injunction limiting picketing to three persons without complying with the provisions of the Norris-LaGuardia Act. The appellee attorney general, who was counsel for the defendant judge in the case, had agreed that the decision in that case (*ILWU v. Wirtz,* No. 11,568), would control, and that it would not be necessary to file in the Supreme Court a similar proceeding against the appellee judge here. However, after the decision of the Supreme Court of the Territory of Hawaii, the appellees here refused to stay the trial of appellants until determination of the issue on appeal in the *Wirtz* case—despite the fact that it is customary in criminal cases not growing out of labor disputes to grant stays under similar circumstances.

The four grounds on which appellants alleged in their complaint that appellees, under color of territorial law, were depriving them of rights guaranteed by the Constitution and laws of the United States, and injuring, oppressing and intimidating them in the exercise of these rights were:

1. The appellee judge was without jurisdiction to issue the ex parte amended restraining order without complying with the provisions of the Norris-LaGuardia Act, and the order was wholly void and deprived appellees of rights guaranteed by that act; that appellees have been indicted for violating a void order of Court, and for conduct which cannot be restrained, and are being forced to defend themselves against

such an indictment before the appellee judge who has already denied that appellees have such rights and whose hands are now tied by the ruling of the territorial Supreme Court, making any attempt on appellees' part to assert their rights in territorial Courts futile; that they will be forced to continue to suffer deprivation of rights unless appellees are restrained.

2. In the alternative, if the Norris-LaGuardia Act does not apply to territorial Circuit Courts, then the appellee judge has no jurisdiction whatsoever to issue the order complained of, because Congress has conferred exclusive jurisdiction to issue injunctions in labor disputes upon the Federal District Court, and then only in strict conformity with the Clayton and Norris-LaGuardia Acts and to restrain acts of fraud and violence, and the same deprivation of appellants' rights as outlined above have occurred and threaten to continue.

3. The Clayton and Norris-LaGuardia Acts confer on appellants, as on all members of unions in the Territory, substantive federal rights which no territorial Court can restrain in the absence of fraud or violence. The provisions of the order complained of are void because they prohibit the free exercise of rights granted to appellants by these laws, and appellants are being charged criminally for doing what Congress gave them a right to do.

4. The order of the appellee judge complained of, and the indictment based upon it, deprive appellants of, rights of free speech and assembly guaranteed to them by the Constitution.

The underlying theory on which the first three grounds of appellants' complaint are based are fully briefed in *ILWU v. Wirtz,* No. 11,568, in the records of this Court, which is set for argument before this Court on July 22, 1948. Inasmuch as these grounds are already fully briefed in the case pending before the Court, counsel requests the indulgence of the Court in incorporating that brief by reference in the instant proceeding since all the discussion and authorities there cited are relevant here.

Upon application and showing made pursuant to Rule 65 of the Federal Rules of Civil Procedure, a temporary restraining order was issued ex parte against the appellee attorney general, and an order to show cause why an injunction *pendente lite* should not be granted was issued against both appellees. (R. 51.) As argument on the return to the order to show cause was not concluded within the ten day period fixed by the rules, the restraining order was extended under the rule an additional ten days.

The appellees' return to the order to show cause, entitled "Defendants' Objection to the Allowance of Preliminary Injunction" (R. 53), raised the following defenses in law:

1. That the District Court has no jurisdiction to enjoin the judge of a circuit court of the Territory.

2. The appellee judge is not a proper party to the suit.

3. A federal District Court has no jurisdiction to enjoin criminal prosecutions in territorial courts.

4. The complaint fails to state a claim for equitable relief on any ground.

After hearing, the Court overruled all of the appellees' objections to the issuance of a temporary injunction.

In its ruling upon the motion for a preliminary injunction (R. 54), the Court said:

> "The question—and the only question now before the court—is whether or not, *pending a hearing upon the merits,* a Temporary Injunction should issue."

After ruling against appellants on the first two causes of action stated in the complaint, the Court said:

> However, in this case, and with reference to the facts alleged and the law involved in the plaintiffs' third and fourth causes of action, a preliminary injunction should and therefore will issue.
>
> * * * * * * *
>
> In brief, with no questions of Territorial law involved at all, it looks as if Plaintiffs are in jeopardy because they did things which federal law allowed.

A preliminary injunction to remain in effect pending hearing on the merits was issued on February 21, 1947. (R. 66.)

At the request of appellees, and with the approval of the Court, appellees' time to answer was extended from time to time. On July 21, 1947, appellees filed their answer (R. 69), admitting, denying and controverting the various allegations of the complaint, and reiterating under the heading "Defenses in Law"

the same objections raised in their objections to the allowances of a preliminary injunction. Attached to appellees' answer as Exhibit "A" was a certified copy of the record and files of the Circuit Court in the equity action before the appellee judge, and attached as Exhibit "B" was a transcript of the evidence taken at the *ex parte* hearing before the appellee judge.

Simultaneously with the filing of their answer, appellees filed a motion for hearing and determination of the defenses before the trial pursuant to Rule 12(d). (R. 306.) Only one new defense in law was raised—that in the light of the Supreme Court's decision in *U. S. v. United Mine Workers,* 330 U. S. 258 (1947), the Territory has authority to punish for contempt violations of orders void because of lack of jurisdiction or in violation of constitutional rights. The Court found it unnecessary to decide this question.

Before argument on the appellees' motion under Rule 12(d) and within the time allowed by Rule 12(f), appellants filed a motion to strike Exhibits "A" and "B" attached to appellees' answer (R. 309) on the ground of immateriality. This motion was filed at a conference in chambers with the district judge in the presence of counsel for appellees. The district judge stated that appellees' motion under Rule 12(d) would be heard first, and a hearing on appellants' motion to strike would then be had.

On September 4, before the conclusion of argument on appellees' motion for determination of defenses

before trial appellees filed a second motion requesting that the whole record including the exhibits annexed to their answers be considered. The appellees stated that this motion was based upon Rules 12 and 56 of the Rules of Civil Procedure. (R. 312.) The notice specified September 8 as the date for hearing—six days less than the required notice of a motion for summary judgment.

After argument on appellees' motions under Rules 12 and 56 and before hearing appellants' motion to strike the exhibits attached to appellees' answers, the Court took its ruling under advisement and informed counsel they would be notified when the Court was ready to rule.

Without affording appellants an opportunity to be heard on their motion to strike, as is shown by the judgment (R. 343), without affording them an opportunity to file counter-affidavits to the *ex parte* exhibits and testimony relied on by the Court, and without an opportunity to be heard on the merits of the allegation of their complaint which included issues of denial of equal protection of the laws and of criminal proceedings not brought in good faith, the District Court converted appellees' motion to dismiss into a motion for summary judgment. (R. 314.)

A judgment and decree in accordance with the Court's decision dismissing the action, dissolving the preliminary injunction, and granting summary judgment for the appellees was entered on December 22, 1947. (R. 344.)

Notice of appeal to this Court (R. 344) and a petition for restoration of the injunction pending appeal were filed on December 24, 1947. (R. 345.) The District Court indicated that it would restore the injunction pending appeal, provided appellants would stipulate with appellees to waive their rights to be confronted by witnesses against them on testimony perpetuated by the appellees, in event any witness whose testimony was so perpetuated was unable to appear when and if the case was heard before the appellee judge. Such a stipulation having been entered into, the injunction pending appeal was ordered. (R. 351.)

The injunction restored was amended to permit appellees to substitute an information for summary contempt charging the identical offense charged in the indictment. Appellees entered into a stipulation with plaintiffs, pursuant to the provision in the District Court's order, that the information for summary contempt based on the same alleged violations of the amended *ex parte* restraining order should be considered with the same force and effect as if the information had been the subject matter of the complaint and that this appeal should apply to the information the same as if summary contempt proceedings by information had been brought by the Territory in the first instance, instead of the indictment. (R. 355.) The information for summary contempt charging the same offense and based on the same portion of the amended *ex parte* order is set forth on page 357 of the record.

QUESTIONS PRESENTED.

1. Did the District Court err in granting summary judgment for appellees and entering the decree dismissing the action and dissolving the preliminary injunction; and in overruling appellants' motion to strike portions of the complaint and the exhibits attached thereto?

2. Did the District Court err in holding that the appellee judge had jurisdiction to issue an *ex parte* restraining order in a case growing out of a labor dispute without complying with the provisions of the Norris-LaGuardia Act.

3. Did the District Court err in holding that Sections 1 and 20 of the Clayton Act and the Norris-LaGuardia Act do not confer exclusive jurisdiction on the Federal District Court of Hawaii to issue injunctions in labor disputes in strict conformity with those acts?

4. Did the District Court err in holding that the Clayton and Norris-LaGuardia Acts operate in the Territory of Hawaii exactly as they do in relation to states, and that these acts do not confer on appellants the right to engage in the concerted labor activity specifically made lawful and unenjoinable by those two acts?

5. Did the District Court err in holding that appellants were not deprived of their constitutional rights of free speech and assembly by the appellees by reason of the issuance of the ex parte amended restraining order, and the indictment based thereon, which proscribed peaceful picketing and assembly?

OPINION OF DISTRICT COURT.

The decision of the District Court is set forth in full at page 314 of the Record.

ARGUMENT.

I.

THE DISTRICT COURT ERRED IN MAKING AND ENTERING ITS JUDGMENT AND DECREE DISMISSING ACTION AND DISSOLVING THE PRELIMINARY INJUNCTION. (Statement of Point on which appellants intend to rely on appeal, Point (a), Record 378-379.)

The District Court erred in considering at all, and in relying on, Exhibits "A" and "B" of appellees' answer in holding valid the amended *ex parte* restraining order, for violations of which appellants were indicted. Or, if this contention be held unsound, certainly the District Court erred in overruling appellants' motion to strike without hearing or without affording appellants an opportunity to controvert Exhibits "A" and "B" and adduce other proof under Rule 56 after adverse ruling on the motion.

The appellants' complaint alleged that the appellees, acting under color of territorial law, had deprived them and were threatening to continue to deprive them of rights guaranteed by the Constitution and laws of the United States. The issue raised by the complaint is that appellants were being prosecuted under an indictment which charged them with feloniously violating an ex parte restraining order enjoining conduct which the laws and the Constitu-

tion of the United States guaranteed them a right to engage in. Appellants, in their first two causes of action, alleged that the Court was wholly without jurisdiction to issue the restraining order by virtue of the Clayton and Norris-LaGuardia Acts.

The issue raised by the complaint is narrow and concise. As stated by the District Court in his ruling on the motion for preliminary injunction (R. 54) it was whether, with no questions of territorial law involved, appellants were in jeopardy because they did things which federal law allowed.

Under the Fifth Amendment to the United States Constitution—which applies in the Territory—appellants cannot be prosecuted for a felony except by indictment. Only the indictment and the provisions of the amended ex parte restraining order alleged to be violated are relevant in determining what the charges against appellees in the territorial Court are. Conviction on a charge not made would be a sheer denial of due process.

The Sixth Amendment requires that appellants be informed of the charge against them; they cannot be convicted on a charge not made, whether misdemeanor or felony. Whether appellees are being deprived of rights guaranteed by federal law and the Constitution must be judged wholly on the indictment and the provisions of the amended restraining order alleged therein to be violated.

In his answer, the appellee judge admitted that he had not complied with the Norris-LaGuardia Act, but

denied that it had any application to territorial Circuit Court judges. Both appellees denied all of appellants' assertions in respect to the deprivation of rights guaranteed by the laws and Constitution of the United States.

Since nothing contained in the records of the equity action before the appellee judge could enlarge or change the indictment against appellants, or affect the determination of whether the asserted deprivation of rights by virtue of the prosecutions for the alleged violations of the amended ex parte order existed, appellants promptly moved to strike from the answer the redundant, immaterial and irrelevant portions of the answer referring to Exhibits "A" and "B" and the exhibits themselves.[2] Without ruling on this motion to strike, the Court proceeded to hear argument on appellees' motion under Rule 12(d). The District Court and the appellees assumed that Rule 12(b) as amended in the new Federal Rules of Civil Procedure had become effective, and that the Court could consider the motion under Rule 12(d) and the untimely motion under Rules 12 and 56 as a motion for summary judgment.[3] Even on

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[2]Under amended rules now in force, proper pleading would be a motion to strike for insufficient defense. Prior to the amendment, some courts had treated a motion to strike for irrelevancy as a proper method to test the sufficiency of a defense.

[3]The amended rules of procedure did not become effective until March, 1948, three months after this case was decided. The old rules made no provision for treating a motion under Rule 12(d) as a motion for summary judgment. By the new rules, the following provisions which the District Court mistakenly thought was in effect, was added:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which

this assumption, however, the Court gave appellants no opportunity to present material pertinent under Rule 56 before entering his decision construing appellees' motion as a motion for summary judgment.

Appellants do not believe the rules require them to controvert the matter contained in these exhibits until after disposition of their pending motion to strike this matter from the answer. They also believe that, under Rule 8(d), providing that "averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided," the exhibits, being incorporated as a part of the answer were deemed denied for the purposes of appellees' motions.[4]

But the district Court went even further and held that even if the exhibits were improper pleading,

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relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

[4]See *Bakery Sales Drivers' Local Union No. 33 v. Wagshal*, 92 L. ed. (Adv. Op.) 599, decided March 15, 1948. There the appellant challenged the use of affidavits attached to a complaint for the purpose of determining whether a labor dispute existed. The Court said:

> But in this case the affidavits were merely a gloss on the complaint and as such constituted an informal amendment. They serve here as allegations, not proof. This case was decided on a motion to dismiss. All that was determined was that on the basis of respondent's claims, which the petitioners chose not to controvert, the Norris-LaGuardia Act did not apply.

Here the affidavits being attached to the answer, it was not necessary to controvert them. Appellants submit that at most, the exhibits constituted allegations and not proof as they were used by the Court.

appellees' motion to consider them in connection with Rule 12 filed during the hearing constituted a speaking motion authorizing the Court to consider them and to construe the motions together as motions for summary judgment, even though appellees' second motion was untimely and appellants' intervening motion had not been heard or disposed of. (R. 314, 320.) At the least, appellants were entitled to an opportunity to controvert the ex parte record.

Appellants were, for example, entitled to show, by affidavit or proof, only three of the appellants were employees of the Lihue Plantation Company and that the ex parte affidavits and testimony contained no allegations or proof of any kind that the remaining appellants had engaged in any conduct of any kind or in any fraud or violence, or in any mass picketing in the strike at Lihue; that there was no basis of allegation or fact contained in the whole record that these appellants had engaged in any conduct whatsoever in connection with the strike of the employees of the Lihue Plantation Company warranting restraint of their federal and constitutional rights to engage in peaceful picketing.

Appellants were entitled to support, by affidavit or proof, their charges of denial of equal protection of the laws.

Appellants were entitled to show that because of the size and scope of the area covered by the restraining order, its application to the towns or camps in which they lived, and the narrowness of the limi-

tation, that their right to picket was drained of all substance and effectiveness, and that appellees were aware of these factors.

Appellants were entitled to show that the appellee judge was disqualified in law under 48 U.S.C.A. 636 to issue any restraining order by virtue of the fact that the relatives of the appellee judge within the third degree of consanguinity and affinity were large stockholders in the Lihue Plantation Company, and that the appellee judge himself was formerly counsel for the Company.

These and other proofs in support of the allegations in their complaint, appellants were entitled to an opportunity to present.

Appellants submit that the District Court committed prejudicial error in relying upon these exhibits, in transforming appellees' motion under Rule 12(d) into a motion for summary judgment, and in overruling appellants' motion to strike without argument and without affording them an opportunity to controvert the exhibits on which the Court relied in reaching his decision.

The Supreme Court of the United States has warned against deciding grave constitutional issues on a motion to dismiss or its equivalent. Thus Mr. Justice Cardozo in his concurring opinion in *Borden's Farm Products Company v. Baldwin,* 293 U.S. 194, 213 said:

> We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon

an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the question clearer.

See also

Dioguardi v. Durning, 139 F. (2d) 744 (1944);
Burt v. City of New York, 156 F. (2d) 791 (1946), and
Picking v. Pennsylvania, 151 F. (2d) 240 (1945).

The record reveals that appellees were afforded two opportunities to present exactly the same defenses in law—first on their objection to the allowance of the injunction *pendente lite,* and second in their motion to determine their legal defenses before trial. On its first ruling the District Court overruled all the defenses presented. On its second ruling, the District Court reconsidered and reversed its ruling that appellants had stated a claim for equitable relief.

The Court's ruling is somewhat confused as to whether this reversal is based on the proposition that reference to the record before the appellee judge shows as a matter of *fact* that there was no deprivation of federal substantive rights nor of rights guaranteed by the First Amendment or whether reference to this record shows as a matter of *law* that there was no deprivation of appellants' federal and constitutional rights.

Is there, the Court asks, any reason to alter the initial ruling that the plaintiffs have stated a claim for equitable relief? (R. 332.) The Court continues:

> I am inclined to believe that there is. It does not now appear to me that the plaintiffs' constitutional rights have been invaded by Judge Rice's restraining order. (R. 332.)

And again, after discussing the record in the *ex parte* proceedings contained in the disputed exhibits:

> . . . I find in *point of law* that plaintiffs' constitutional rights have not been invaded by the Amended Restraining Order.
>
> There being no genuine *issues of fact* remaining to be tried, summary judgment for the defendants may be entered. (R. 339.)

It certainly cannot be said as a matter of law that any judge bound by the Constitution of the United States can decree that out of hundreds of farm workers on strike only three can exercise their right to peacefully picket and assemble simultaneously on country roads at points of ingress and egress. Nor can it be said as a matter of law that a judge can make the exercise of the right by such strikers to assemble in groups of more than three conditional on their remaining ten peripatetic feet apart.

The only justification that has been advanced for enjoining peaceful picketing since the outmoding of the lone missionary permitted in the *Tri-City* case is a background of violence flagrant and long continued. It certainly would not be argued that on an assertion by an employer of violence in picketing and of irreparable injury an equity judge could issue an order against the general public directing that there be no assembling near this employer's property.

Whether restraints on peaceful picketing are justified—if they can be justified at all—must depend on facts, not law.

Where, as here, peaceful assembly has been enjoined and the engaging in peaceful assembly charged as a crime, appellants are surely entitled to some opportunity to show the facts on which they base their allegations of deprivation of rights guaranteed by federal law and of injury, intimidation and oppression in the exercise of those rights.

Appellees were afforded two opportunities for hearing on exactly the same defenses, and appellants were denied even an opportunity to controvert facts which the Court held in point of law entitled appellees to summary judgment.

It seems unlikely that it was ever the intention of the federal rules to apply the pre-trial determination of legal defenses in an injunction suit, for the very purpose of injunction *pendente lite* is to maintain the status quo pending *hearing on the merits*. The legal defenses are heard before its issuance or refusal.

But even assuming the propriety of the District Court's consideration of, and reliance on, the record contained in appellee's Exhibits "A" and "B" without affording appellants an opportunity to be heard on their motion to strike, the District Court erred in holding that the record contained in these exhibits justified the restraints imposed by the appellee judge on peaceful picketing. An examination of this record shows that the request of the Lihue Plantation Company for an *ex parte* order against picketing was

made on a spurious claim of great emergency as a part of employer strike strategy. It is obvious that the defendants in the equity action before the appellee judge could have been afforded notice and an opportunity to be heard within the same space of time as it took to prepare secretly the great mass of affidavits and to take the *ex parte* testimony, set forth in these exhibits.

Even a cursory examination of the voluminous record calls to mind Justice Frankfurter's questioning of the wisdom of ex parte orders which are frequently asked by employers on spurious claims of great emergency and irreparable injury as a part of the employer's strategy in breaking the strike and disrupting morale of the strikers. In his book, *The Labor Injunction,* he says at pages 223-224:

> An examination of the detailed history of federal cases discloses that perhaps the most serious abuse in the present state of the law is due to the elastic clause of the Clayton Act which permits such *ex parte* orders to remain effective for ten days and to be extended by the court "for good cause shown." As a result, the restraining order has frequently been kept alive for weeks and months. There is only one possible justification for qualifying the basic principle of giving parties an opportunity to be heard before action against them; the needs of an emergency may outweigh the risks of one-sidedness and consequent hardship. When, however, applicants for such orders spend many days in framing affidavits by the score and perfecting their complaints, and, on occasions, as did the United States Government in the Railway Shopmen's Strike, allow themselves time to

put the whole mass of documents through the press under cover of utmost secrecy lest anyone discover that an application to a court is contemplated—the inference must follow that emergency claimed is emergency feigned. Surprise is obviously the tactical advantage sought through such an order.

Is it wise for courts of equity, particularly federal courts, under these circumstances to countenance dispensation of the prime requisites of due process,—notice and opportunity to be heard? This question, indeed, raises a serious doubt as to the adequacy of the five-day limitation as a corrective. Certainly the time limit as phrased should be strengthened, at least by an express provision that the order be not renewable. The really adequate solution would be abolition of *ex parte* restraining orders in these cases, based upon a realization that the *ex parte* order possesses potentialities of great evil and is too rarely of sufficient immediate necessity to outweigh the dangers of its abuse. Such, it may be recalled, was the recommendation made in earlier years by the present Chief Justice and would be a return to the historic rule in the federal courts. Wisconsin conforms its law to experience by denying restraining orders in labor disputes except upon forty-eight hours' notice.

Appellants respectfully submit that the judgment and decree of the District Court should be reversed, and appellants afforded an opportunity to be heard on the merits.

II.

THE DISTRICT COURT ERRED IN HOLDING THAT THE APPELLEE JUDGE HAD JURISDICTION TO ISSUE THE EX PARTE RESTRAINING ORDER ON WHICH THE INDICTMENT IS BASED WITHOUT COMPLYING WITH THE PROVISIONS OF THE NORRIS-LA GUARDIA ACT, AND IN HOLDING THAT THE ORDER IS VALID AND DOES NOT DEPRIVE APPELLANT OF FEDERAL RIGHTS. (Statement of Points on which appellants intend to rely on appeal, Points (h), (l), (n), (o), (q), Record 378, 379-381.)

The District Court both in its ruling on the preliminary injunction (R. 54) and in its decision upon appellees' motion for determination of defenses in advance of the trial (R. 314) held that the Norris-LaGuardia Act does not limit the jurisdiction of Circuit Courts of the Territory. The Court cited with approval the decision of the Supreme Court of the Territory in *ILWU v. Wirtz* now pending on appeal before this Court which involves this issue. The Court differed with the conclusion reached in that case that the Norris-LaGuardia Act applies only to constitutional Courts of the United States, and held specifically that it applies to the Federal District Court for Hawaii which is a legislative Court of the United States.

Since the question of the application of the Norris-LaGuardia Act to Territorial Circuit Courts is fully briefed in the *Wirtz Case,* No. 11,568, reference is hereby made to appellants' opening and reply briefs in the *Wirtz* case, and it is requested that the arguments contained therein be considered in this case as fully as if set forth at this point in this brief.

Briefly, it is appellants' contention that territorial Courts, including the Circuit Courts of the Territory of Hawaii on which the appellee judge serves, are subject to the provisions of the Norris-LaGuardia Act because they are Courts whose jurisdiction is conferred, defined and limited by Act of Congress.

Section 13 (d) of the Norris-LaGuardia Act defines the words "Courts of the United States" as used in the act as "any Court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the Courts of the District of Columbia."

Territorial Courts were created by Congress and their jurisdiction was conferred, defined and limited by Congress, and they are at all times subject to its plenary control. Territorial Courts thus fall squarely within the definition contained in the act, and the act, therefore, clearly limits their jurisdiction. Nor is the clear-cut legislative definition of Courts contained in the Norris-LaGuardia Act the only factor that compels this conclusion. The Norris-LaGuardia Act amends the Sherman and Clayton Acts.[5]

It must therefore be given the same scope and coverage as the Sherman and Clayton Acts which it amends.

The Sherman Act and Clayton Act specifically apply to the Territory of Hawaii. Thus under Section 1 of the Clayton Act commerce is defined as commerce between or in and within the territories of the United

[5] *U. S. v. Hutcheson,* 312 U.S. 219.

States. Under both these acts the Supreme Court has held that Congress exercised its full and plenary power. *United States v. Frankfort Distilleries,* 65 S. Ct. 661; *Apex Hosiery Co. v. Leader,* 310 U. S. 469, 495; in *Atlantic Cleaners & Dyers v. United States,* 286 U. S. 427, the Supreme Court held that the power exercised by Congress in the enactment of the provision of Section 3 of the Sherman Act within the District of Columbia, was its plenary power to legislate for the district.

The language used in respect to the district and territories in both the Sherman and Clayton Acts is identical. It, therefore, is clear that both these acts apply fully to the territory and constitute an exercise by Congress of its conceded plenary power to legislate for the territory.

If the Norris-LaGuardia Act, as an amendatory act, is not given the same scope and geographical effect, the absurd result follows that unamended Clayton and Sherman Acts are in effect in the territory.

The Norris-LaGuardia Act, like the Sherman and Clayton Acts, is an exercise by Congress of its plenary power to legislate for the territory.

As interpreted by the Supreme Court in the *United States v. Hutcheson,* 312 U. S. 219, the Clayton and Norris-LaGuardia Acts

1. exempt labor organizations engaged in labor disputes from the anti-trust acts,

2. drastically limit the power of Courts to issue injunctions in labor disputes,

3. specifically make lawful all the labor union activity defined in Section 4 of the Norris-LaGuardia Act.

Since the power of the territorial legislature is limited to laws not inconsistent with the laws of the United States locally applicable, the legislature could not confer, and a Circuit Court does not have power to enjoin acts specifically made lawful under *all* laws of the United States.

Section 1 of the Norris-LaGuardia Act (29 U.S.C.A. 101, *Appendix infra*) provides that no Court as therein defined has *jurisdiction* to issue injunctions in a case involving or growing out of a labor dispute, except in strict conformity with the act.

If, as appellants contend, the Norris-LaGuardia Act limits the jurisdiction of Circuit Courts, the amended temporary restraining order issued by the appellee judge is void, and the appellants have been deprived of rights guaranteed by that act by the appellees.

If the act applies, the appellee judge had no power under the act to restrain the conduct for which appellants have been charged criminally under the ex parte order.

The Norris-LaGuardia Act was passed in 1933. Its application to District Courts of the territory had been unchallenged from 1938, when Le Baron, first judge of the Circuit Court of the First Judicial Circuit, ruled that it was applicable to territorial Circuit Courts. The order issued by the appellee judge was the first ex parte injunction in a labor dispute in the

territory since the 1938 ruling. The ruling of the Territorial Supreme Court in the *Wirtz* case has made ex parte injunctions an employer vogue. Injunctions blanketing a whole island have been issued.

It is respectfully submitted that the District Court erred in holding that the Norris-LaGuardia Act does not apply to territorial circuit courts, and that appellants have not been deprived of rights guaranteed by the Clayton and Norris-LaGuardia Acts by the appellees under color of territorial law. Appellants submit that the first cause of action stated in their complaint was erroneously dismissed.

III.

THE DISTRICT COURT ERRED IN HOLDING THAT SECTIONS 1 AND 20 OF THE CLAYTON ACT AND THE NORRIS-LA GUARDIA ACT DO NOT CONFER EXCLUSIVE JURISDICTION ON FEDERAL DISTRICT COURTS OF THE TERRITORY TO ISSUE INJUNCTIONS IN LABOR DISPUTES. (Statement of Points on which appellants intend to rely on appeal. Point (i).)

This theory, which is in the alternative to the first cause of action stated in appellants' complaint, is argued in appellants' briefs in *ILWU v. Wirtz,* which has already been referred to with the request that they be considered in this case.

In summary appellants contend that if the intent of Congress is to be effected, there is only one alternative construction to holding the Norris-LaGuardia Act applicable to a Circuit Court of the Territory. That is to construe the act as manifesting an inten-

tion to confer exclusive jurisdiction, subject to limitations contained in the act, on the Federal District Court for the Territory of Hawaii to issue injunctions in cases involving or growing out of labor disputes.

This construction would fully effect the purposes of the act and would not be inconsistent with its provisions. Under this theory, as in the first cause of action, the appellee judge was without jurisdiction to issue the amended order, and his order is wholly void.

IV.

THE DISTRICT COURT ERRED IN HOLDING THAT THE CLAYTON AND NORRIS-LA GUARDIA ACTS OPERATE IN THE TERRITORY OF HAWAII EXACTLY AS THEY DO IN RELATION TO STATES, AND IN DENYING THAT THESE ACTS CONFER ON APPELLANTS THE RIGHT TO ENGAGE IN THE CONCERTED LABOR ACTIVITY MADE LAWFUL AND UNENJOINABLE BY THESE TWO ACTS. (Statement of Points on which appellants intend to rely on appeal, Points (j), (p) and (q).)

The District Court, in its ruling on appellants' motion for a preliminary injunction held that the Clayton and Norris-LaGuardia Acts jointly construed, as the Supreme Court in the Hutcheson[6] case said they must be, create federal substantive rights.

The preliminary injunction should issue, the Court said, because in the absence of any territorial law, and in the light of the definite federal laws relat-

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[6]310 U.S. 88.

ing to permissible labor conduct—which laws the territorial Courts, too, must respect—there seems here to be a substantial question as to whether or not that which under federal law may be allowable conduct can —by restrictions placed thereon by a Court, however reasonable they might be—become, as the Supreme Court says, "the road to prison." (See *U. S. v. Hutcheson,* 312 U. S. 219; *Thornhill v. Alabama,* 310 U. S. 88; *Hague v. CIO,* 307 U. S. 507.)

The Court reversed itself in its final decision holding that the "allowable conduct" under the Clayton and Norris-LaGuardia Acts is binding upon the territory insofar as it coincides with the First Amendment, but beyond that is no more binding on the territory than it is on a state.

To reach this conclusion the Court accepted the construction argued by Livingston Jenks, counsel for the Hawaii Employers Council, *amicus curiae.* Mr. Jenks argued that the provision in Section 20 of the Clayton Act that none of the specified acts "shall be held to be violations of any law of the United States" means "violations of the Sherman Act or any other federal law which might have a bearing on the Sherman Act." (R. 22.)

Appellants cannot square this construction with the Supreme Court's ruling in the *Hutcheson* case that:

> The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later act. In this light, Section 20 removes all such allowable conduct from the taint

of being a "violation of any law of the United States," including the Sherman Law.

All the power exercised by the territory comes from Congress—whether exercised by the territorial judiciary or by the legislature—and the power delegated by Congress is only power "consistent with the laws and Constitution of the United States."[7] The proposition, therefore, that federal substantive rights have no more effect on territorial Courts than on state Courts cannot stand.

The Norris-LaGuardia Act and the substantive rights thereunder do not affect state Courts. They affect only federal Courts in the several states. The Constitution gives to Congress plenary power over the territory. Congress has no such power over the states. The Sherman and Clayton Acts demonstrate well the territory's different status from a state. While these laws do not affect commerce that is intrastate, Congress has regulated every phase of commerce in and within the territory.

Nor are the Clayton and Norris-LaGuardia Acts the first time that Congress has exercised its plenary power to legislate for the territory, particularly in the field of labor. The National Labor Relations Act applied to commerce within the territory as well as to commerce between the territory and the states. The old National Industrial Recovery Act regulated labor relations within the territory to the full extent of Congress' plenary power.

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[7]Organic Act, 48 U.S.C.A. 495, 496, 519, 562, 635.

The territorial legislature has fully recognized the exercise by Congress of its plenary power to legislate in the field of labor relations. Thus in the Hawaii Employment Relations Act of 1945, the legislature both recognized the exercise by Congress of its plenary power to legislate for the territory in the National Labor Relations Act and the National Railway Labor Act and limited the scope of that act to persons not "subject to the National Labor Relations Act and the Railway Labor Act."[8]

The Norris-LaGuardia Act, which is an amendment to the Clayton and Sherman Acts finds its constitutional basis in the power to create federal Courts and to define and limit the jurisdiction of Courts created by it, a power which Congress likewise possesses over territorial but not state Courts.

It is appellants' contention that the substantive rights created by that act affect all persons in the Territory in a manner in which Congress would not have power to legislate for the States. This intention of Congress to exercise the full power it has, while recognizing it could not affect state Courts and state law, is clear from the congressional debates. Mr. LaGuardia, co-author and house sponsor of the bill, after explaining that the bill prevented federal Courts from being used as an agency for strike breaking and as an employment agent for scabs to break lawful strikes, continued:

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[8]The territorial law operates only within the scope of exemptions contained in the federal law. See Session Laws of Hawaii, 1945, Act 250, Sec. 3.

> The bill does not take one iota of jurisdiction—*because we have not the power*—from the State Courts and does not change any State law. (Cong. Rec. Vol. 75, Part 5.)

No one reading the legislative history of the Act can doubt that Congress intended to strike down the improvident granting of labor injunctions wherever it had to the power to do so. Appellants believe that the Norris-LaGuardia and Clayton Acts create substantive rights which accrue to all persons in the Territory. Their belief is based directly upon the explicit language of the *Hutcheson* case which says the Norris-LaGuardia Act, read as it must be with Section 20 of the Clayton Act, prescribed the allowable area of labor conduct, and that Congress in the Norris-LaGuardia Act specifically made lawful all conduct enumerated in Section 4 of that Act. (29 U.S.C. 104.) One of those rights made lawful was the right to engage in concert with others in "patrolling" and disseminating information in labor controversies.

Even before the *Hutcheson* case the Supreme Court in *New Negro Alliance v. Sanitary Grocery Company,* 303 U. S. 552 said:

> The legislative history of the act demonstrates that it was the purpose of the Congress further to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by federal courts and to obviate the results of the judicial construction of that act. It was intended that the peaceful and orderly dissemination of information by those defined as persons interested in

> a labor dispute concerning "terms and conditions of employment" in an industry or a plant or a place of business *should be lawful;* that, short of fraud, breach of the peace, violence, or conduct otherwise unlawful, those having a direct or indirect interest in such terms and conditions of employment should be at liberty to advertise and disseminate facts and information with respect to terms and conditions of employment, and peacefully to persuade others to concur in their views respecting an employer's practices.

See also *Wilson v. Birl,* 27 F. Supp. 915, 105 F. (2d) 948, where substantive rights were recognized. See 2 Teller, *Labor Disputes,* p. 1298. *Houston and N. T. Motor Freight Lines v. Local Union, etc.,* 24 F. Supp. 619. Certainly the restraining of the international union and the local union who were not shown in any way to have participated in the acts complained of by *ex parte* order was a violation of Section 6 of the Act.[9]

Here, almost all the plaintiffs are not employees of Lihue Plantation Company and were, therefore, clearly not participants in any alleged acts upon which the respondent judge based the *ex parte* temporary restraining order.

It is appellants' contention that the interpretation placed on federal substantive rights created by the Norris-LaGuardia Act by federal Courts should be applied in the Territory.

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[9]See *United States Brotherhood of Carpenters and Joiners v. U. S.,* 67 S. Ct. 775, where this section was held to be a substantive right on which defendants in a criminal trial were entitled to an instruction.

When rules laid down by federal Courts in respect to substantive rights created by the Norris-LaGuardia Act are applied as appellants contend they should be, it is clear that the appellee circuit court judge did not have power to issue the *ex parte* order complained of without infringing on these substantive federal rights. Federal Courts have specifically stated that peaceful mass picketing is not fraud or violence within the meaning of the Act. They have recognized that the conduct made unrestrainable is lawful and was intended to be made legitimate measures of offense and defense in labor disputes.

Thus in *Wilson v. Birl,* 27 F. Supp. 915, the District Court in refusing an injunction in a case growing out of a labor dispute said:

> The Norris-LaGuardia Act was intended to limit drastically the power of the Federal Courts to issue injunctions in labor disputes. In fact, it might be said in a general way that the purpose was to put an end to it, *except for a residue of jurisdiction necessary for the protection of property against destruction by violence or fraud.*
>
> To accomplish the purpose of the act, Congress enumerated in Sec. 4 various types of conduct as to which jurisdiction to enjoin was taken away. *The list covered a wide field of labor conflict activities and implicitly recognized the conduct in question as legitimate measures of offense and defense in labor disputes.*
>
> In this enumeration the Act is wholly objective. It is not concerned with the purpose for which the acts are done or with the state of mind of the participants or with any question of intent

expressed or presumed. The law makes no distinction between doing the acts in question with a legal object in view and doing them with an illegal object. See *Levering & Garrigues Co. v. Morrin,* 2 Circ., 71 F. 2d 284. In short, it was an adoption of the philosophy of Justice Brandeis' dissenting opinion in *Duplex Printing Press Company v. Deering,* 254 U. S. 443, 41 S. Ct. 172, 183; 65 L Ed. 349, 16 ALR 165 which condemned the point of view which made conduct actionable "when done for a purpose which a judge considered socially or economically harmful and therefore branded as malicious and unlawful."

The Circuit Court of Appeals in affirming the decision of the District Court approved the language of the District Court, saying:

> The picketing here complained of averaged 10 to 15 persons at a time; and on one occasion rose to 97. The subsections dealing with picketing found in (e) and (f) are as follows:
>
> (e) Giving publicity to the existence of, or the facts involved in any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute.
>
> Again, the uncertain test, expressed in the word "lawful" (picketing) is not employed. If the picketing is peaceful, unaccompanied by acts of violence, irrespective of whether it may be mass picketing, and therefore *according to appellant's*

argument illegal in Pennsylvania, it cannot be enjoined by a federal court. Strikes and picketing are general acts, involving concerted efforts; the narrow limit of federal restraining power, under this act, is confined to forbidding defined acts of individuals.

The purpose of the Act, to quote the trial judge, was "to take the Federal courts out of the business of granting injunctions in labor disputes, except where violence or fraud are present."

Carter v. Herrin Motor Freight Lines, 131 F.2d 577, 560, clearly recognized that the enumerated acts not only are unenjoinable but are expressly recognized to be legitimate labor activity:

The language of the Act is too plain and the decisions construing it too clear cut and positive to admit of any doubt that the purpose and effect of the Act as a whole, was to give expression to, and make effective the policy which breathes throughout it. The policy is that labor disputes, as such, with the assembling, the picketing, the persuasion, the stopping of work, the enlisting of sympathy and support, and all the other acts expressly enumerated in Section 104, were no longer to be the subject of injunction action but were, and were expressly recognized to be, legitimate means of advancing the interests of the working man, and, therefore, of the people as a whole. . . .

It has been pointed out in numerous decisions, and as long as the statute stands unrepealed and unamended, it cannot be too often repeated by the courts, that the act was passed because, whether rightly or wrongly Congress, or at least a majority in Congress, was of the opinion, that the atti-

> tude of employers in general toward labor disputes was not only wrong, but intransigent and recalcitrant, that federal injunctions were commonly resorted to in such disputes for the purpose of obtaining backing in this attitude, and that the use of such injunctions in labor disputes except for the limited purpose of preventing injury from violence where there was really no adequate remedy at law was an abuse of legal process.

The right to engage singly or in concert in picketing and assembling to further the interest of persons engaged in a labor dispute surely cannot be limited to three pickets under rigidly prescribed conditions on an *ex parte* request of an employer by a territorial circuit court judge without destroying these federal substantive rights.

See appellant's opening and reply briefs in *ILWU v. Wirtz,* already referred to, and especially the report of the Senate Committee, *Report on the Norris-LaGuardia Act,* set forth in the appendix of the Reply Brief.

Appellants respectfully submit that the District Court erred in holding that the Norris-LaGuardia Act does not make lawful and unenjoinable the rights enumerated in Section 4 of the Norris-LaGuardia Act.

V.

THE DISTRICT COURT ERRED IN HOLDING THAT APPELLANTS WERE NOT DEPRIVED OF THEIR CONSTITUTIONAL RIGHTS OF FREE SPEECH AND ASSEMBLY BY APPELLEES UNDER COLOR OF LAW BY REASON OF THE ISSUANCE OF THE AMENDED EX PARTE RESTRAINING ORDER AND THE PROSECUTION OF APPELLANTS UNDER THE INDICTMENT FOR ENGAGING IN PEACEFUL PICKETING AND ASSEMBLY. (Statement of ponts on which appellants intend to rely on appeal, Point (k).)

At the outset of this discussion it is necessary to differentiate between appellants' contention that they have by the conduct of appellees been deprived under color of territorial law of federal substantive rights created by the Norris-LaGuardia Act and appellees' claim that they have also been deprived of rights guaranteed by the Constitution.

The purpose of the Norris-LaGuardia Act was to encourage the use of non judicial processes in the area of economic conflict. The evils and abuses of the labor injunction, the questionable traditional equity jurisdiction in labor disputes—a jurisdiction which American Equity Courts, unlike English Courts discovered they possessed only at the end of the last and the beginning of this century—brought about the formulation of the public policy of the United States. See Frankfurter and Greene, *The Labor Injunction,* pages 20-21.

Certainly the evils found by the Congress and the declared usurpation of the spurious equity power by Courts in the field of labor injunctions is just as persuasive in the territory as elsewhere. Since the power of the territorial Courts and the legislature is limited

to acts consistent with federal laws and the Constitution, these courts are bound by the public policy formulated by the act.

In holding constitutional the Norris-LaGuardia Act, the Supreme Court merely said:

> There can be no question of the power of Congress thus to define and limit the jurisdiction of inferior courts of the U. S. *Lauf v. Shiner,* 303 U. S. 323.

Appellants contend that the scope of the substantive rights given by the Norris-LaGuardia Act overlap constitutional guarantees but that the two are not coextensive in every respect; that the Norris-LaGuardia Act embraces a wider scope since only acts of fraud or violence are enjoinable and then only after the employer has in good faith made an attempt to settle the dispute.

Now as to the constitutional issue: the sole question here involved is whether a Circuit Court of the territory can prohibit peaceful picketing and can circumscribe the rights of free speech and assembly guaranteed by the first amendment as narrowly as the appellee judge has done in his amended *ex parte* temporary restraining order without hearing and without finding in accordance with the principles of due process of great and imminent danger to the state and the public.

What in fact does his order encompass? He has provided that 100,000 members of the ILWU shall not "in any manner . . . mass picket or assemble in crowds

. . ." on or near the real property of the petitioner—which includes public highways—whether used for business or residence purposes—12,472 acres comprising 20 company towns—or to interfere with ingress to or egress from said real property.

Mass picketing or congregating in crowds is defined as groups in excess of three at any point of ingress and egress and at other points groups larger than three must be in motion. Even this limited activity must not otherwise violate any of the provision of the order.

All powers exercised by the territory either through its legislature or its Courts are exercised by virtue of delegation from Congress. The power of Congress is limited by the Bill of Rights. The first amendment unequivocally provides:

> Congress shall make no law . . . abridging freedom of speech . . . or the right of people peaceably to assemble.

In the case of the Territory which derives its power from Congress these fundamental liberties are not transmitted through the privileges and immunities clause of the 14th Amendment for they are a restriction on the power of Congress itself.

Appellants are not here contending that the Territory has no power to regulate labor unions and their activity. It may even be asumed that a Circuit Court of the Territory can, consistent with the Constitution, regulate mass picketing. What appellants question is the power of a Circuit Court to so narrowly

define mass picketing without regard to the nature, size and scope of the industrial conflict as to sweep within its ambit both lawful and unlawful conduct in vague, indeterminate language, the construction of which can only be determined in attempted prosecutions.

Appellants contend that Congress itself could not so narrowly define the rights proscribed by this sweeping previous restraint on the exercise of these fundamental rights.

Appellants do not agree with the District Court that we are here concerned with an order tailored carefully and precisely to meet a particular and defined danger, great and immediate; appellants believe no stronger showing could be made of a situation where fundamental rights of individuals to free speech and assembly have been hacked to size to meet the demands of a corporation.

The principle of *Marsh v. Alabama,* 326 U. S. 501, that the fundamental rights of free speech and assembly occupy a preferred position has been mutilated on the slender ground of a corporation's asserting that its property rights will be injured. On this ground the means of free communication for hundreds of people living in company towns are denied.

The restraint on free speech and assembly contained in the *ex parte* temporary restraining order and the indictment must be judged on their face upon the clear principle laid down in *Thornhill v. Alabama,* 310 U. S. 88 (1940). The indictment

against the appellants is a general one framed in the words of the amended temporary restraining order. The appellees do not have to show that the appellee judge could have constitutionally written a different order covering their actions, for

> Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression.

Appellants contend that the mass picketing dicta in the *Thornhill* case cannot be so woodenly and arbitrarily applied that Congress, or the territorial legislature or the defendant judge can, by invoking the use of the words "picketing en masse", justify any restraint on free speech and assembly they see fit to impose. Here the restriction imposed is dangerously close to the lone missionary which the Supreme Court approved in the *Tri-City* case when it regarded picketing as sinister and before the identification of picketing and dissemination of information in labor disputes with free speech and assembly.

As the Supreme Court said in *Norris v. Alabama,* 294 U. S. 587, 590:

> When a federal right has been specially set up and claimed in a state court, it is our province to inquire not whether it was denied in express terms, but also whether it was denied in substance and effect.

Appellants contend that the proscription of the *ex parte* temporary restraining order and the charge

of the indictment prohibits the overt act of peaceably assembling, sweeps within its purview conduct well within the bounds of peaceful picketing, and under the guise of regulation of "picketing en masse" deprives appellants under color of territorial law of fundamental constitutional rights.

It comes briefly to this: if this order is valid, a Circuit Court of the Territory can do without hearing what neither the Congress of the United States nor any state legislature has the power to do by law.

CONCLUSION.

Appellants respectfully submit that the judgment appealed from should be reversed, the motions to dismiss and for summary judgment should be overruled, and that the injunction *pendente lite* should be restored pending hearing on the merits of appellants' complaint.

Dated, Honolulu, T. H.,
June 29, 1948.

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(Appendix Follows.)

Appendix.

Appendix

CLAYTON ACT.

Section 1. Statutory restriction of injunctive relief.

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or

persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peacefully assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Section 20. "Person" or "persons" defined.

The word "person" or "persons" wherever used in section 52 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

NORRIS-LaGUARDIA ACT.[1]

Section 101. Injunction prohibited except as herein provided.—No Court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act [Chapter]; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act [Chapter].

[1] 29 U.S.C.A. 101-115.

Section 102. Public policy of United States.—In the interpretation of this Act [Chapter] and in determining the jurisdiction and authority of the Courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the Courts of the United States are hereby enacted.

Section 103. Certain undertakings not enforceable by injunction.—Any undertaking or promise, such as is described in this section, or any other undertaking or promise in section 2 of this Act [§102 of this title]

is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any Court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such Court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

Section 104. Grounds for injunction limited.—No Court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act [§103 of this title];

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any Court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act [§103 of this title.]

Section 105. Same; combinations or conspiracies.—No Court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4 of this Act [§104 of this title.]

Section 106. Member of union; when not liable for acts of others.—No officer or members of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any Court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof.

Section 107. Hearing on sworn complaint; testimony; findings; notice; irreparable injury; period of restraint; undertaking.—No Court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the Court, to the effect:—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the Court shall direct, to all known persons against whom relief is sought, and also the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: Provided, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and

irreparable injury to complainant's property will be unavoidable, such a temporary restaining order may be issued upon testimony under oath, sufficient, if sustained, to justify the Court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the Court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the Court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the Court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking

from electing to pursue his ordinary remedy by suit at law or in equity.

Section 108. Person violating obligation not entitled to relief.—No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

Section 109. Findings; specific order.—No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the Court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the Court as provided herein.

Section 110. Appeal to Circuit Court of Appeals.—Whenever any Court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the Court shall, upon the request of any party to the

proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the Circuit Court of Appeals for its review. Upon the filing of such record in the Circuit Court of Appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except old matters of the same character.

Section 111.—Contempt; trial by jury; contempts in presence of Court.—In all cases arising under this Act [Chapter] in which a person shall be charged with contempt in a Court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: Provided, That this right shall not apply to contempts committed in the presence of the Court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the Court in respect to the writs, orders, or process of the Court.

Section 112. Same; disqualification of judge.—The defendant in any proceeding for contempt of court may file with the Court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred elsewhere than in the presence of the Court or so

near thereto as to interfere directly with the administration of justice. Upon the filing of any such demand the judge shall thereupon proceed no further, but another judge shall be designated in the same manner as is provided by law. The demand shall be filed prior to the hearing in the contempt proceeding.

Section 113. What constitutes labor dispute; participants; Courts included.—When used in this Act [Chapter], and for the purpose of this Act [Chapter]—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dis-

pute if belief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any Court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the Courts of the District of Columbia.

Section 114. Partial invalidity.—If any provision of this Act [Chapter] or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of the Act [Chapter] and the application of such provisions to the other persons or circumstances shall not be affected thereby.

Section 115. Repealer.—All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.